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In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN FINISHING COMPANY, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion; its order enforcing the Board's order (Pet. App. A4) is reported at 389 F. 2d 1004. The Board's Decision and Order (J.A. 3a-19a)[1] are reported at 159 NLRB 976. The Board's decision in the underlying representation case (J.A. 193a-200a) is unreported.

[1] "J.A." refers to the joint appendix in the court below, a copy of which has been filed in this Court.

JURISDICTION

The order of the court of appeals was entered on March 4, 1968 (Pet. App. A4), and a petition for rehearing was denied on April 3, 1968 (Pet. App. A5). The petition for a writ of certiorari was filed on May 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that the employer's machine printers are not supervisors within the meaning of the National Labor Relations Act.[2]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A1-A3.

STATEMENT

The Board found that petitioner Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Machine Printers and Engravers Association of the United States, which had been certified as the representative of the Company's journeymen and apprentice machine printers. The basic issue is whether the Company's refusal was justified on

[2] Petitioner does not argue the other questions presented (Pet. 2).

the ground that the machine printers are supervisors within the meaning of Section 2(11) of the Act and thus excluded from its coverage. The facts relevant to this issue are as follows:

Petitioner is engaged in bleaching, dyeing, finishing, printing, sanforizing, and performing other related processes on cotton textiles at its plant in Memphis, Tennessee. The plant employs between 800 and 900 employees. The printing department is under the supervision of the superintendent of printing, and has six regular and two spare machine printers. The department operates three 8-hour shifts, 5 days a week. The shift consists of a shift foreman and 14 other employees, including two machine printers designated as "assistant foremen," each of whom has three employees working under him[3] (J.A. 194a, n. 3, 21a, 29a).

The machine printers operate the four printing machines in the department (J.A. 37a, 69a). They set up the machines for production—installing and adjusting the printing rollers, color pans, and other components—and make necessary adjustments to remedy minor defects which develop while the machines are in operation (J.A. 78a-81a). More serious problems are referred to the shift foreman, who oversees all activities in the printing department and is admittedly a supervisor under the Act (J.A. 77a). If it becomes necessary for the printer to leave the machine while it is in operation, the shift foreman takes

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[3] The Board based its findings on the record of this case and on prior decisions of the Board involving the same plant (J.A. 194a, n. 3).

his place (J.A. 83a). The printer is assisted in operating the machine by a "back-tender," who helps prepare the machine for production, keeps the color pans filled, and makes adjustments as directed; and by an "inspector," who inspects the printed cloth and submits samples to the printer upon request (J.A. 70a, 77a, 89a-90a).

In 1948, when the Union first sought to represent the machine printers, the Company distributed to all assistant foremen a memorandum entitled "Assistant Foreman's Right to Hire and Fire" (J.A. 26a, 37a-39a). The memorandum advised such employees that they have, *inter alia*, the authority to hire and fire the rank-and-file employees under them; to recommend effectively hiring, transfers, promotions, layoffs, and discharges; to initiate and carry out any necessary reprimands or other disciplinary action; to handle grievances; to plan and assign work to the employees under them; and to grant time off (J.A. 171a-175a). In fact, however, the printers' disciplinary activities were limited to reprimanding their helpers for mistakes or minor misconduct, and—except in one instance—there was no evidence that any printer had ever carried out, or effectively recommended, the suspension, discharge, or other serious discipline of any helper (J.A. 136a-138a, 142a, 145a, 147a).[4] The printers rarely recommended their helpers for promotions or raises, and, when they did, their recommendations had often been ignored (J.A. 129a,

[4] On one occasion, a helper had been discharged after one of the machine printers complained to the shift foreman that he was not doing his work (J.A. 124a).

132a, 140a). No printer had ever blocked a raise (J.A. 94a), processed a grievance (J.A. 131a, 141a, 148a-149a), or been asked to grant time off (J.A. 129a, 135a, 147a).[5]

The printers, like the back-tenders and inspectors, punch a time clock and receive an hourly wage (J.A. 63a); get paid time and a half for overtime (J.A. 66a); receive no pay for time off because of illness (J.A. 66a); and enjoy the same vacation benefits as rank-and-file employees (J.A. 66a-67a). In contrast, shift foremen are salaried (J.A. 64a); receive no pay for overtime (J.A. 66a); enjoy longer vacations after a shorter period of service (J.A. 67a); and after seven years service receive considerably higher pay than journeymen machine printers (J.A. 63a; Tr. 130-131).

Finally, the Board found that, if the machine printers are supervisors, the ratio of supervisory to non-supervisory employees in the printing department would be one to three, in contrast to a one-to-seven ratio in the other plant departments (J.A. 27a).

On the basis of these facts, the Board concluded that "the supervision exercised by the [machine printers] over the 'backhelp' is that normally exercised by a skilled craftsman over his helper and not that of a supervisor over an employee," and that the machine printers were not supervisors within the meaning of Section 2(11) of the Act (J.A. 28a-29a, 194a, n. 3). The Board, finding further that the machine printers were "an identifiable, skilled, and homogeneous craft

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[5] Printers Brown and Roberts did not believe they had authority to grant such a request (J.A. 131a, 139a).

* * * group and constitute a unit appropriate for * * * collective bargaining" (J.A. 194a, n. 3), and that they were not covered by the Company's outstanding contract with another union (J.A. 193a, n. 2), directed an election among them (J.A. 195a-196a). The Union won the election and was certified (J.A. 196a-200a), but the Company refused to bargain with it (J.A. 3a, 9a-11a). In subsequent unfair labor practice proceedings, the Board held that the Company's refusal to honor the certification violated Section 8(a)(5) and (1) of the Act, and ordered the Company to bargain with the Union, upon request (J.A. 3a-19a). The court of appeals, in a *per curiam* order, held that the Board's findings were "supported by substantial evidence on the record considered as a whole," and enforced its order (Pet. App. A4).

ARGUMENT

Section 2(11) of the Act defines a "supervisor," whom Section 2(3) excludes from the Act's coverage, as:

> any individual having authority * * * to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The determination whether an individual is a "supervisor" involves the application of these criteria to the

facts of the particular case, and the Board's ruling must be upheld if it is supported by substantial evidence. *National Labor Relations Board* v. *American Oil Company*, 387 F. 2d 786 (C.A. 7), certiorari denied, May 6, 1968 (No. 1288, this Term); *National Labor Relations Board* v. *Southern Bleachery & Print Works, Inc.*, 257 F. 2d 235 (C.A. 4), certiorari denied, 359 U.S. 911; cf. *National Labor Relations Board* v. *United Insurance Co.*, Nos. 178 and 179, this Term, decided March 6, 1968. The Board correctly applied those criteria here, and the facts summarized in the Statement (*supra*, pp. 3-5) support its conclusion, sustained by the court below, that the Company's machine printers do not possess the authority and judgment required to make them supervisors within the meaning of Section 2(11).[6] There is no occasion for further review of this factual issue.

Contrary to the Company's contention (Pet. 11-12), the Board did not ignore the settled principle that it is the possession rather than the exercise of the powers enumerated in Section 2(11) which determines supervisory status. The Board found that, although the Company's memorandum purported to give

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[6] Petitioner stresses (Pet. 5, 10) that all persons whom it has designated as assistant foremen, including the eight machine printers here involved, are not covered by its collective bargaining agreement with the Textile Workers Union. But the fact that the latter union apparently views the printers as supervisors does not undermine the Board's finding, based on the detailed facts in the record, that in fact they do not have that status. The record does not support petitioner's assertion (Pet. 4) that the printers "have the same supervisory authority and duties as the other assistant foremen * * *."

the machine printers such powers (*supra*, p. 4), they did not in fact possess them. In making this determination, the Board properly considered that there was no showing that the machine printers had ever performed certain functions. While the nonexercise of a power otherwise shown to exist may not be sufficient to negate supervisory status, the non-performance of a function is a relevant factor in determining whether power to exercise it actually exists.[7]

Nor is there substance to the Company's contention (Pet. 14-15) that the Board's decision was based on the practice of the industry generally, rather than that of the Company itself. The Board, although recognizing that "the [Company was] under no obligation to operate [its] business in accordance with the prevailing industry practice," merely noted that "[m]achine printers in the textile printing industry [were] not normally vested with the powers of a supervisor" (J.A. 27a).

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[7] The cases relied upon by the Company (Pet. 11-12) are distinguishable on their facts. In *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385 (C.A. 6), certiorari denied, 338 U.S. 899, the court found that the control operator, with some minor exceptions, "handles the entire operation of the plant" (p. 387), had "authority in time of emergency to requisition any men on the spot," and had "on various occasions used this authority" (p. 388). In *National Labor Relations Board* v. *LeLand-Gifford Co.*, 200 F. 2d 620 (C.A. 1), the court found that, of the 13 individuals found by the Board to have lost their supervisory status after a change in the employer's operation, at least 3 had in fact "retained one or more men under their supervision, control and direction" (p. 626). As shown *supra*, the machine printers here do not exercise the power they purportedly have.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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